

ELDER PROTECTION PROVISIONS

2005 GENERAL SESSION

STATE OF UTAH

Sponsor: Patricia W. Jones

LONG TITLE

General Description:

This bill provides for the protection of elder adults, clarifying provisions concerning the appointment of a guardian or conservator and payment of attorneys' fees for specific proceedings.

Highlighted Provisions:

This bill:

- ▶ provides for the award of attorneys' fees to a prevailing party in an action against a perpetrator for exploitation of an elder adult;
- ▶ requires that an incapacitated or protected person or their estate be required to pay attorneys' fees and costs for an action to appoint a guardian or conservator if a guardian or conservator is appointed by a court; and
- ▶ clarifies that the guardian of an incapacitated person may be granted the same powers as a conservator, if a conservator is not also appointed.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

62A-3-314, as enacted by Chapter 108, Laws of Utah 2002

75-5-303, as last amended by Chapter 104, Laws of Utah 1988



75-5-407, as enacted by Chapter 150, Laws of Utah 1975

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **62A-3-314** is amended to read:

62A-3-314. Private right of action -- Estate asset.

(1) A vulnerable adult who suffers harm or financial loss as a result of exploitation has a private right of action against the perpetrator.

(2) Upon the death of a vulnerable adult, any cause of action under this section shall constitute an asset of the estate of the vulnerable adult.

(3) In any action, other than a medical malpractice action, brought under this section, the prevailing party is entitled to an award of reasonable attorneys' fees and costs.

Section 2. Section **75-5-303** is amended to read:

75-5-303. Procedure for court appointment of a guardian of an incapacitated person.

(1) The incapacitated person or any person interested in the incapacitated person's welfare may petition for a finding of incapacity and appointment of a guardian.

(2) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity; and unless the allegedly incapacitated person has counsel of the person's own choice, it shall appoint an attorney to represent the person in the proceeding ~~[the cost of which shall be paid by the]~~. The person alleged to be incapacitated shall pay the fees of the attorney appointed by the court to represent him, unless the court determines that the petition is without merit, in which case the attorney fees and court costs shall be paid by the person filing the petition.

(3) The person alleged to be incapacitated may be examined by a physician appointed by the court who shall submit a report in writing to the court and may be interviewed by a visitor sent by the court. The visitor also may interview the person seeking appointment as guardian, visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that the person will be detained or reside if the requested appointment is made, and submit a report in writing to the court.

(4) (a) The person alleged to be incapacitated shall be present at the hearing in person and see or hear all evidence bearing upon the person's condition.

(b) If the person seeking the guardianship requests a waiver of presence of the person alleged to be incapacitated, the court shall order an investigation by a court visitor, the costs of which shall be paid by the person seeking the guardianship. The investigation by a court visitor is not required if there is clear and convincing evidence from a physician that the person alleged to be incapacitated suffers from:

~~[(a)]~~ (i) ~~[fourth stage]~~ severe dementia of the Alzheimer's ~~[Disease]~~ type;

~~[(b)]~~ (ii) extended comatosis; or

~~[(c)]~~ (iii) profound mental retardation.

(c) The person alleged to be incapacitated is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or the person's counsel so requests.

(5) Upon the appointment of a guardian for an incapacitated person, the costs, including reasonable attorneys' fees for the petitioner who commenced the proceedings, shall be paid by the incapacitated person, provided that the estate of the incapacitated person can reasonably pay the costs and fees. If the court finds that the estate of the incapacitated person cannot reasonably pay the costs and fees, the costs and fees may become a lien against any interest the incapacitated person has in real property.

Section 3. Section **75-5-407** is amended to read:

75-5-407. Procedure concerning hearing and order on original petition.

(1) Upon receipt of a petition for appointment of a conservator or other protective order because of minority, the court shall set a date for the hearing on the matters alleged in the petition. If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the choice of the minor if 14 years of age or older. A lawyer appointed by the court to represent a minor has the powers and duties of a guardian ad litem.

(2) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing. Unless the person to be protected has counsel of his own choice, the court may appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem. If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic

90 intoxication, the court may direct that the person to be protected be examined by a physician
91 designated by the court, preferably a physician who is not connected with any institution in
92 which the person is a patient or is detained. The court may send a visitor to interview the
93 person to be protected. The visitor may be a guardian ad litem or an officer or employee of the
94 court.

95 (3) After hearing, upon finding that a basis for the appointment of a conservator or
96 other protective order has been established, the court shall make an appointment or other
97 appropriate protective order.

98 (4) Upon the appointment of a conservator for a protected person, the costs, including
99 reasonable attorneys' fees for the petitioner who commenced the proceedings, shall be paid by
100 the protected person, provided that the estate of the protected person can reasonably pay the
101 costs and fees. If the court finds that the estate of the protected person cannot reasonably pay
102 the costs and fees, the costs and fees may become a lien against any interest the protected
103 person has in real property.

Legislative Review Note
as of 12-7-04 8:41 AM

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

Office of Legislative Research and General Counsel

Fiscal Note
Bill Number HB0167

Elder Protection Provisions*18-Jan-05**9:00 AM*

State Impact

No fiscal impact.

Individual and Business Impact

Persons affected by this legislation could experience some additional legal costs.

Office of the Legislative Fiscal Analyst